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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FRANK CARLEO,

Plaintiff and Respondent,

v.

HPJ, INC.,

Defendant and Appellant.

B174484

(Los Angeles County
Super. Ct. No. GC031371)

APPEAL from orders of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed.

Law Offices of Ricky W. Poon and Ricky W. Poon for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

HPJ, Inc., a California corporation doing business as ABS Auto Body Repair & Paint, appeals from the trial court's orders denying its motion to vacate a default judgment for \$8,562 entered in favor of Frank Carleo and granting Carleo's motion to withdraw his voluntary dismissal of HPJ, which had been entered two weeks after the default judgment. We affirm.¹

FACTUAL AND PROCEDURAL BACKGROUND

Frank Carleo, an attorney, filed a lawsuit for breach of contract and abuse of process in February 2003 against his former clients Paul M. Du and Du's company HPJ. The contract claim and a related common count sought recovery of unpaid legal fees of \$7,500. The abuse of process claim alleged that Du and HPJ had filed a groundless complaint against Carleo with the State Bar of California and thereafter in the California Supreme Court in an attempt to dissuade Carleo from pursuing his fee claim against them and further alleges Du was responsible for republication of the State Bar charges in various unrelated actions in which Carleo was involved.

Du, acting in propria persona, filed a special motion to strike the complaint under Code of Civil Procedure section 425.16,² contending each of the causes of action asserted by Carleo arose from Du's protected free speech or petitioning activity. Carleo filed opposition papers. Following a hearing on May 1, 2003, the trial court denied Du's motion to strike.³ At the conclusion of the hearing the court gave Du 10 days to answer the complaint, set the matter for an order to show cause re filing of Du's answer and indicated the matter would be reclassified as a limited civil case.

¹ Carleo failed to file a respondent's brief. Accordingly, we consider the record, HPJ's opening brief and its oral argument to determine whether there was prejudicial error. (Cal. Rules of Court, rule 17(a)(2); *In re Bryce C.* (1995) 12 Cal.4th 226, 232-233.)

² Statutory references are to the Code of Civil Procedure unless otherwise indicated.

³ We affirmed the order denying Du's special motion to strike in an unpublished decision filed February 19, 2004. (*Carleo v. Du* (Feb. 19, 2004, B167158) [nonpub. opn.])

On May 5, 2003, prior to any order from the trial court reclassifying the case, Carleo filed a request for entry of default as to HPJ. The request included the original summons and proof of service as to corporate defendant HPJ, indicating that the service documents had been hand-delivered to Du, as president and registered agent for HPJ, on March 4, 2003 and had been mailed to HPJ's business address on the same day. The default was entered by the court on May 5, 2003. On October 31, 2003 the trial court entered a default judgment against HPJ for \$8,562 (the principal sum of \$7,500, plus accrued, prejudgment interest of \$892 and costs of \$170).

On December 8, 2003 and again on December 15, 2003 HPJ filed ex parte applications to vacate the default judgment and to quash a writ of execution issued in favor of Carleo. Following denial of those applications, on January 2, 2004 HPJ filed a regularly noticed motion to vacate the default judgment and to quash the writ of execution. In support of its request for relief from default, HPJ argued its failure to respond to the complaint was due to excusable neglect: It asserted it had mistakenly believed Du's appeal of the denial of his special motion to strike the complaint stayed all proceedings in the case as to both Du individually and HPJ.⁴

On February 5, 2004 the trial court denied HJP's motion for relief from default, finding it had no jurisdiction to grant relief under section 473, subdivision (b), because the default had been entered more than six motions prior to the filing of HPJ's motion.

On January 15, 2004, prior to the hearing on HPJ's motion, Carleo filed a request for dismissal without prejudice as to HPJ only (that is, leaving the action pending against Du individually), apparently because he had collected the full amount set forth in the default judgment. The clerk entered the dismissal on the same date. Carleo subsequently

⁴ Du's appeal of the order denying his special motion to strike, filed May 12, 2003, automatically stayed further proceedings in the trial court against him individually, but not as to HPJ, which had not moved to strike the complaint. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195, fn. 5 [appeal from denial of an anti-SLAPP motion does not stay proceedings relating to causes of action not affected by motion].)

filed a motion to withdraw his voluntary dismissal, explaining he had inadvertently filed the request for dismissal rather than a satisfaction of judgment. (A satisfaction of judgment was filed on January 22, 2004.) On April 15, 2004 the trial court granted Carleo's motion to withdraw his voluntary dismissal of HPJ, ruling that the clerk should not have accepted the request or entered the voluntary dismissal once a judgment had been entered against HPJ.

DISCUSSION

1. *The Trial Court Did Not Abuse Its Discretion in Denying HPJ's Motion to Vacate the Default Judgment*

Under section 473, subdivision (b), a trial court may relieve a party from the entry of default caused by the party's own mistake, inadvertence, surprise or excusable neglect, provided application for relief is made within six months of the entry of the default. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)⁵ The six-month time limitation is jurisdictional; the court has no power to grant relief under section 473 once the time has lapsed. (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970; see *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 735, fn. 3; *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855.)⁶

⁵ Section 473, subdivision (b), provides in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. . . ."

⁶ HPJ notes Carleo violated the time requirements established by California Rules of Court, rule 201.7(g) and (h) for filing a request for entry of default and obtaining a default judgment and argues the trial court should have been equally tolerant of his belated filing under section 473. However, unlike the six-month time limit in section 473, subdivision (b), the time limits in rule 201.7 are not jurisdictional. (See Gov. Code, § 68608, subd. (b) [trial court has discretion to impose sanctions, including dismissal of case if less severe sanctions would not be effective, for failure to comply with the time limits established by the Trial Court Delay Reduction Act].)

HPJ's motion was filed approximately eight months after its default was taken, although within two months of entry of the default judgment. As the trial court held, the general rule is that the six-month period within which to bring a motion to vacate runs from the date of the default, not from the date of the subsequently entered default judgment. (*Rutan v. Summit Sports, Inc.*, *supra*, 173 Cal.App.3d at p. 970; *Nemeth v. Trumbull* (1963) 220 Cal.App.2d 788, 791.) "The reason for the rule is that vacation of the judgment alone ordinarily would constitute an idle act; if the judgment were vacated the default would remain intact and permit immediate entry of another judgment giving the plaintiff the relief to which his complaint entitles him." (*Rutan*, at p. 970.)⁷

Although the trial court had no jurisdiction to vacate the default entered in May 2003 under section 473, HPJ is correct as a conceptual matter that the trial court may, in appropriate circumstances, grant relief with respect to the default judgment itself: "[T]he 'default and default judgment are separate procedures.' [Citation.] The latter does not necessarily have any bearing on, and *may* be set aside without disturbing, the former. [Citations.]" (*Rutan v. Summit Sports, Inc.*, *supra*, 173 Cal.App.3d at p. 970; *Jonson v. Weinstein* (1967) 249 Cal.App.2d 954, 958.) The question remains, however, whether granting relief from the default judgment, but not the default itself, would be an idle act even if the moving party has otherwise demonstrated its entitlement to relief. (See *Nemeth v. Trumbull*, *supra*, 220 Cal.App.2d at p. 790 [challenge to fundamental pleading defect supports motion to vacate default judgment].)

Here, HPJ's motion requested that the trial court set aside the default judgment due to its excusable neglect in not defending the action. HPJ argued it had not received proper service of the complaint, its failure to defend was caused by its excusable neglect in assuming the action had been stayed by Du's appeal of the denial of his special motion

⁷ A motion for relief under section 473, subdivision (b), based on an attorney's sworn affidavit of fault (sometimes referred to as the "mandatory relief provision" of section 473) is timely if filed within six months of entry of the default judgment. (*Hu v. Fang* (2002) 104 Cal.App.4th 61, 64; *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294.) HPJ's motion to vacate included no attorney affidavit or declaration.

to strike the complaint and it had a valid defense to the action. Because each of those grounds was addressed to the entry of HPJ's default, not to the validity of the default judgment, granting relief from the default judgment alone could have served no useful purpose. (See *Brooks v. Nelson* (1928) 95 Cal.App. 144, 147-148 ["A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's cause of action; he cannot thereafter, until such default is set aside in a proper proceeding, file pleadings or move for a new trial, or demand notice of subsequent proceedings. [Citations.] If the judgment were vacated it would be the duty of the court immediately to render another judgment of like effect, and the defendant[], still being in default, could not be heard in opposition thereto. [Citation.]"])

Accordingly, because it could grant no effective relief by vacating the default judgment alone, it was not an abuse of discretion for the trial court to deny HPJ's motion. (See *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 597-598; *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1399.)⁸

2. The Trial Court Did Not Abuse Its Discretion in Granting Carleo's Motion to Withdraw the Voluntary Dismissal of HPJ

Explaining that he had inadvertently filed a request to dismiss HPJ, rather than a notice of satisfaction of judgment, after collecting the default judgment in full, Carleo

⁸ Because it was not properly raised in the trial court, HPJ has forfeited any argument it was error for the court to take its default and to enter a default judgment without first reclassifying the matter as a limited civil case. (See *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117 ["issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal"].) Moreover, although not a party to the prior appeal arising from this case, *Carleo v. Du, supra*, B167158, during that appeal HPJ asked this court, rather than the superior court appellate division, to stay further proceedings regarding the default judgment and writ of execution, arguing that reclassification was not appropriate because Carleo sought equitable relief in addition to damages. (See *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 [purpose underlying doctrine of judicial estoppel is to prevent a litigant from "playing fast and loose" with the courts by taking inconsistent positions over the course of judicial proceedings].)

moved from an order permitting him to withdraw the dismissal pursuant to section 473, subdivision (b). In support of the motion, in addition to confessing his own “unadulterated stupidity,” Carleo argued that a voluntary dismissal without prejudice was not authorized by section 581 following entry of judgment and the dismissal was therefore void. The trial court agreed with Carleo’s analysis and granted the motion.

On appeal, as it had in the trial court, HPJ argues that the voluntary dismissal was filed by Carleo knowingly and for the improper purpose of depriving the trial court of jurisdiction to consider its motion to vacate the default judgment. To the extent the trial court granted the motion pursuant to section 473, subdivision (b), to relieve Carleo of the adverse consequences of his mistake or inadvertence, thereby resolving the parties’ factual dispute in favor of Carleo, we properly defer to the trial court’s decision. (See *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 [“The trial court, with declarations and supporting affidavits, was able to assess credibility and resolve any conflicts in the evidence. . . . Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court’s ruling is based on oral testimony or declarations.”].)

Carleo’s additional, legal argument for withdrawing the dismissal -- that a plaintiff may not request, and the clerk of the court should not enter, a voluntary dismissal without prejudice after entry of judgment (or at any other time after commencement of the trial) -- finds support in the express language of section 581: Section 581, subdivision (c), provides a plaintiff may dismiss his or her complaint as to any defendant with or without prejudice “prior to the actual commencement of trial.” Section 581, subdivision (e), on the other hand, provides that, after commencement of trial, the complaint may be dismissed without prejudice only upon a showing of good cause unless all affected parties consent. Neither condition was satisfied in this case: HPJ did not consent to the dismissal, and the trial court made no finding of good cause.

In addition, HPJ did not address this issue in the trial court and fails to do so in its opening brief on appeal. Accordingly, any argument the trial court erred as a matter of

law in ruling that the dismissal was invalid has been waived. (*Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1413 [unless party’s brief contains legal argument with citation of authorities on the point made, “the court may treat is as waived and pass on it without consideration”]; see *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [it is not the appellate court’s function to address arguments not raised on appeal]; *Dills v. Redwood Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [appellate court “will not develop the appellants’ arguments for them”].)

DISPOSITION

The orders are affirmed. Because no respondent’s brief was filed, the parties are to bear their own costs on appeal.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.